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No. 856

BRIEF OF RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

LOCAL UNION 976, JOINT COUNCIL 67, WESTERN CONFERENCE OF TEAMSTERS, THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

vs.

DAIRY DISTRIBUTORS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

BRIEF OF RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion in this case of the Supreme Court of Utah is found at 329 P.2d 414 and a copy of the opinion appears in the Appendix to the Brief of the Petitioners. A petition for rehearing in this matter was denied by the Supreme Court of Utah on January 26, 1959.

JURISDICTION

The petitioners attempt to invoke the jurisdiction of this court upon the provisions of Title 28, Section 1257 (3) of the United States Code and upon the assertion that the court below improperly construed and applied various sections of the Labor Management Relations Act of 1947, and particularly Sections 301(e) and 303.

It is the claim of the respondent that the only portion of Title 28, Section 1257(3), United States Code, which has any applicability is that portion of Subsection 3 which relates to the situation where any title, right, privilege or immunity is specially set up or claimed under the Constitution. No other portion of Section 1257 has any applicability to this case. It is the contention of the respondent that no federal or constitutional question is properly framed under Subsection 3 of Section 1257, United States Code. This contention of the respondent will be more fully treated herein in the Argument.

The respondent further contends that the court below did not improperly apply or construe any of the sections of the Labor Management Relations Act of 1947 relied upon by the petitioners, but on the contrary applied the sections of that act involved in accordance with the constructions and applications given it by the federal circuit courts and by this court. A more complete statement of this contention will also appear in the Argument.

QUESTIONS PRESENTED

1. Whether the picketing complained of by the plaintiff below and respondent here had any effect on the re-

fusal of Dorman's employees to unload and receive the product of the respondent?

It is clear from the testimony of witnesses for the respondent, Fred Rico and Gywellskog, that Dorman's employees refused to unload cheese and that these refusals extended in time from July 26, 1955, through September 7, 1955. (Tr. 151-171)

It further appears from the testimony of Victor Dorman that he told the respondent Gossner that "our employees don't want to unload any more Dairy Distributors' cheese. Don't send any more with Dairy Distributors' trucks." (Tr. 89)

There was a concerted refusal on the part of Dorman's employees to handle Cache Valley Association cheese; and the employees were induced by the picketing efforts of Rash and Ballew and nothing else because the Dormans wanted the cheese and had never told their employees not to unload it. (Tr. 272, 273)

2. Whether the International Union and the Western Conference can escape the consequences of the acts of their agents by now denying agency?

3. Whether the claim of violation of the due process clause of the United States Constitution has been raised properly in any proceeding in the courts below or has been properly framed in this Petition for a Writ of Certiorari.

STATUTES INVOLVED

Section 303 of the Labor Management Relations Act, designated as Title 29, Section 187, U.S.C.A.:

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affect-

ing commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object there of is —

"(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having the jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. June 23, 1947, 3:17 p.m. E.D.T., c. 120, Title III, Para. 303, 61 Stat. 158."

Title 29, Section 185(e), U.S.C.A., which reads as follows:

"For the purpose of this section and in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether

the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

STATEMENT OF FACTS

At the ouset it must be remembered that Dairy Distributors, Inc., plaintiff and respondent in the court below, was a separate corporate entity entirely set apart from the Cache Valley Dairying Association or any other business enterprise. (Tr. 66) The defendants and appellants in the court below and your petitioners here at no time were a "bargaining authority" or in any capacity representative of the employees of Dairy Distributors, Inc., for any purpose. (Tr. 118, 119)

With this material truth in mind, we state the facts. The incorporators and stockholders of Dairy Distributors, Inc. were Edwin Gossner, his wife, his son Edwin, Jr., his daughter Delores and one Arnie Hansen (Tr. 13). These people formed this closed corporation in September of 1952 (Tr. 12). The executive board of the Cache Valley Dairymen's Association had declined to go into the trucking business (Tr. 11). Dairy Distributors purchased the necessary motorized equipment and employed the necessary personnel to carry on the trucking operation (Tr. 14-15). The net profit for the years 1953, 1954 and the first half of 1955 averaged $1,000.00 per month (Tr. 29).

Dairy Distributors' principal source of income was from business transacted with Dorman and Company of New York City (Tr. 16). On or about July 27th of 1955, Dorman advised Dairy Distributors that there was a picket line in front of the Dorman establishment and that Dorman employees would not cross the picket line and did not want

to unload the cheese from Dairy Distributors' truck (Tr. 16). See Plaintiff's Exhibits 5, 6, 7, 8, 9, 10, 11, 13, 14, and 15. The picketing signs read:

NOTICE

The Cheese *Carried and Delivered*

By This Truck Has Been Worked

Processed By

NON-UNION

EMPLOYEES

of the *Cache Valley Dairymens*

Assoc. Smithfield, Utah

Teamsters Joint Council No. 67

Plaintiff's Exhibit No. 13 (Emphasis added).

From that time on Dairy Distributors' business was disrupted (Tr. 17); they made but two more shipments of cheese to New York, one in September and another in October. Normally Dairy Distributors had two trucks on the road steadily, one going east and one returning to the west (Tr. 15). There had never previously been a dispute between Dairy Distributors, or the Dairy Distributors' employees, and the Teamsters Union (Tr. 21, 22). The union had attempted to secure recognition as the representative of the employees of Cache Valley Dairymens Association (Tr. 22).

Dairy Distributors, Inc. had encountered no labor difficulties; the record shows:

> Q. The reason you went out of business was because of the picketing difficulties?
>
> A. The Dairy cheese picketing in New York.
>
> Q. The sole reason you went out of business was because you had serious labor difficulties?
>
> A. Dairy Distributors had no labor difficulties to my knowledge.
>
> Q. Who did have the difficulties, why did you go out of business then?
>
> A. On account of the cheese couldn't be handled any more by Dairy Distributors. The employees didn't give me any trouble, — had no labor trouble.
>
> Q. The reason you did go out of business was because of labor difficulties as I get it?
>
> A. Because of picketing. (Tr. 40).

Dairy Distributors' business had been a profitable one until interferences therewith by your petitioners. Paul B. Tanner, Certified Public Accountant, was auditor for Dairy Distributors (Tr. 68, 69). The corporation audits were admitted in evidence (Tr. 71). The books and audits show the corporation's operation to have been a profitable one. When the books were closed the assets were $56,131.00 as against liabilities of $6,808.71 (Tr. 224).

The record discloses that prior to 1950, at Amalga, Utah, a cooperative association of milk producers, Cache Valley Dairymen's Association, managed by one Gossner, manufactured and distributed cheese over a wide area, including east and west coast points. Principal customer was Dorman & Co., New York City. In 1950 the Utah-Idaho

Central Railroad discontinued business, and as a result the association lost its railhead. Use of other railroads made competition with Wisconsin cheese in the New York area prohibitive. Under Utah statutes and the association's articles, it could not operate a transportation business. Without a back haul from the east, the association could not have competed, with its own equipment, in the New York market. Gossner formed a trucking company, with his immediate family and one other, incorporating the plaintiff, Dairy Distributors. This corporation purchased cheese from the association, shipped and sold it to Dorman in New York, purchasing back haul commodities there (principally calcium chlorite) for resale in Utah.

Dairy Distributors' corporation had an annual $1,500,000 gross operation from September, 1952, to the latter part of July, 1955, enjoying a monthly profit of about $1,000. During this period, Dairy Distributors constantly had one truck headed for Dorman's with a $12,000 cargo of perishable cheese, and one headed west with a back haul. Local 976 had been signatory to a contract with the association, but upon its termination, negotiations for renewal at increased wages failed. Thereafter the union suspended all of its members working for the association for failure to cooperate with the union. It later took the position such employees were no longer members of the union, as was reflected in the banner employed on the picket line that proved to become a vital link in the chain of events culminating in this litigation.

In May, 1955, one Rash, Secretary-Treasurer of Local 976, accompanied by one Ballew, troubleshooter loaned by a Seattle labor agency to assist Local 976 in its negotiations

with the association, went to New York to see one of the Dormans. They enlisted the aid of one Ristuccia, Secretary-Treasurer of New York Local Teamster Union 277 that represented Dorman's employees, in making the approach. The conceded purpose of the visit was to urge Dorman to pressure the association into bargaining with Local 976, and in aid thereof to urge Dorman to refuse acceptance of any more cheese manufactured by the association. (Tr. 111).

On July 26, 1955, a load of Dairy Distributors' cheese arrived at Dorman's dock early in the morning, as did Local 976's representatives, Rash, Ballew and one Lott. Mr. Rosen, member of the New York Teamsters' Local and Dorman's foreman, having been advised that his union had sanctioned the picketing refused to unload the shipment. A picket banner appeared and Dorman's establishment and Dairy Distributors' truck was picketed by Rash and Lott, and the cheese was not unloaded until five o'clock the same day. Dorman contacted Gossner in Utah and advised him that there was a picket line in front of his place of business picketing Dairy Distributors' truck, advising that his employees would not cross the picket line and did not want to unload the cheese.

Dairy Distributors shipped no more cheese to Dorman's until about six weeks later, on September 7, when Rosen told the driver the cheese could not be unloaded until the Dormans arrived. The Dormans advised him that the union would have to be contacted. Following such contact, he was told that the union would not permit the unloading. The cheese was not unloaded but was taken elsewhere and placed in storage.

Dairy Distributors made one more attempt to ship cheese to Dorman's about two months later, on October 31, 1955, when the Dairy Distributors' equipment again was picketed. Dairy Distributors made no effort thereafter to sell cheese to Dorman's but liquidated its trucking business, a result caused by the picketing and interference with Dairy Distributors' business dealings with Dorman. It had been made clear that Dorman's place of business and the Dairy Distributors' equipment would be the subject of continued picketing whenever it was deemed advisable to foster the union's cause. So speaks the record and the court below considered thus the facts.

ARGUMENT

a. There is no erroneous application or construction of any federal statute by the court below.

The petitioners attempt to avoid liability for the International Union and the Western Conference by contending that the active participants in the picketing were not their representatives or agents.

It is clear from the record that both the Western Conference and the International Union were by these persons connected with the activity which is complained of in this action (Tr. 141-143).

In this connection we cite again Title 29, Section 185(e) which reads:

> "For the purposes of this section in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question whether the specific acts

performed were actually authorized or subsequently ratified shall not be controlling."

The petitioners contend that because the specific acts were neither ratified nor authorized directly by the International Union, or an officer thereof, the International Union and the Western Conference are not liable.

We invite attention to the case of *International Longshoremen's and Warehousemen's Local No. 8 v. Hawaiian Pineapple Company et al.*, a Ninth Circuit Court decision reported at 226 Fed. 2d 875.

In that decision the court refers to the section above quoted and uses this language:

> "We think the section was intended to cover the acts of the officers of the Union who deal with employers or with the public. That is, if a Union puts or lets an officer or other representative get into a position where he can and does cause trouble proscribed by the act, then the Union is responsible."

In this connection also we refer to the case of *United Mine Workers of America v. Patton*, 211 Fed. 2d 742, a decision of the Circuit Court of Appeals for the Fourth Circuit. This opinion contains the following discussion of the question of agency here raised by the applicants for the writ.

> "The chief argument of defendants in support of their motion for directed verdict is that there is no evidence that they authorized or ratified the strikes upon which plaintiffs rely for recovery. It is true that there is no evidence of any resolution of either the United Mine Workers or District 28 authorizing or ratifying the strikes. There is evidence, however, that the strikes were called by the

> Field Representative of the United Mine Workers, who was employed by District 28, and that he was engaged in the organization work that was being carried on by the international union through District 28, which was a mere division of the international union. Members of the union are members of local and district unions as well as the international; and of the $4 monthly dues paid by them, $2 goes to the international union, $1 to the local union and $1 to the district organization. It is clear that in carrying on organizational work in the field representative is engaged in the business of both the international union and the district and that both are responsible for acts done by him within the scope and course of his employment. Stockwell v. United States, 13 Wall. 531, 545-548, 20 L. Ed. 491; Hindman v. First Nat. Bk. of Louisville, 6 Cir., 112 F. 931, 57 L.R.A. 108; Oman v. United States, 10 Cir., 179 F.2d 738; United States v. Waters, 7 Cir., 194 F.2d 866; Jefferson Standard Life Ins. Co. v. Hedrick, 181 Va. 824, 27 S.E. 2d 198; 2 Am. Jur. 279."

Defendants' answer in this cause admits that Local 976 of which Rash was an officer and Joint Council 67 engaged in picketing; the trustee for Local 976 was appointed by the executive board of the International Union and Local 976 members paid part of their dues to the International. These facts dispose of defendants' argument having to do with the contention that the Western Conference and the International were strangers to this action for lack of a principal-agent relationship. It cannot be said as a matter of law that no agency existed. (R. 121-123)

b. The petitioners presented for the first time the question of remote and speculative damages in their petition for rehearing before the Supreme Court of Utah. No

question was ever raised either in the record at the trial or in the briefs or arguments before the Supreme Court when the matter was originally heard by the Supreme Court of Utah. The question of whether the damages awarded based upon the verdict are remote and speculative has now been raised practically for the first time before this court.

The books and records of the respondent were introduced in evidence together with an accounting summary (Exhibit P. 16, Tr. 339). It appears that from an examination of the transcript and this exhibit, together with the other testimony relating thereto, that the damages assessed were not based upon speculation but upon competent evidence properly admitted at the trial and not objected to by the petitioners.

In this connection the court's attention is invited again to the case of *United Mine Workers of America v. Patton*, 211 Fed. 2d 742.

That opinion contains the following language with respect to the propriety of a judgment based upon a verdict in face of the claim that the damages were remote and speculative:

> "Another argument is that no damage has been shown because it is said that the three year lease had not been delivered and future profits of the business which plaintiffs were forced to abandon were purely speculative. We think, however, that the evidence sufficiently showed that plaintiffs had established a profitable business under the arrangement they had with Clinchfield, and that irrespective of the [illegible] year lease a sufficient basis had been laid for [illegible]ard of damages. As said by the Supreme Court in Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563, 51 S. Ct.

248, 250, 75 L. Ed. 544, a tort case arising under the Sherman Act:

> 'Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.'

"See also Bigelow v. R.K.O. Radio Pictures, Inc., 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652, and Polar Steamship Corp. v. Inland Overseas Steamship Corp., 4 Cir., 136 F. 2d 835."

c. The petitioners contend that a statute involving the Interstate Commerce Commission was improperly or inaccurately construed or applied by the court below. The only reference to this is found on Page 3 of the Petitioners' Brief which says as follows:

> "The court wrongfully applied Federal law under the Interstate Commerce Commission Act, thereby depriving petitioners of the defense that the respondent illegally operated without an I.C.C. permit and could not recover the loss of future profits."

This is the only reference to the Interstate Commerce Commission Act which appears any place in the petitioners'

statement. No specific section is invoked or quoted, either in the petitioners' brief herein, and no specific quotation or reference to any section of the act was ever raised at any stage of the proceedings below.

d. No federal or constitutional question is properly framed by petitioners under Title 28, Subsection 3 of Section 1257, U. S. Code,

Section 1257 provides in part:

> "Final judgments or decrees rendered by the highest court of a State in which decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> "By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Your petitioners do not here question the validity of the federal statute; they say simply that: "The jurisdiction of this Court is invoked under 28 U.S. Code, Sec. 1257(3), the court below having improperly construed and applied various sections of the Labor-Management Relations Act of 1947 and particularly Sections 301(3) and 303 thereof, (61 Stat. 136, 29 U.S.C., § 151, et seq.) in a manner such as to deprive petitioners of rights protected under such statute and under the Federal Constitution • • • " (Petition, pages 1 and 2.)

Thereafter, in petitioners' application for certiorari inferences are made to a deprivation of property without due process of law and questions are argued to this court based upon questions of fact presented to the court below. Ordinarily this court will not exert its jurisdiction merely to review a decision of the state court upon a question of fact. And once a case is otherwise before it, the court generally will not reexamine the state court's findings and conclusions of fact. *Grayson v. Harris*, 267 U.S. 352, 358; *Portland R. Co. v. Railroad Commission*, 229 U.S. 397, 412; *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160. The record in this cause does not show that the state court rendered a decision in a federal question of substance that had not before been determined by this court, or that the decision of the state court was not in accord with applicable decisions of this court. Nor will the record sustain petitioners' contention (1) that there was a lack of agency shown; (2) that there was but a single picketing; (3) that the picketing did not induce Dorman's employees to refuse to unload the cheese; (4) that the picketing was not the cause of the discontinuance of respondent's business; (5) or that the damages assessed were remote, speculative or excessive.

CONCLUSION

Jurisdiction in this cause should not be invoked; certiorari should be denied.

Respectfully submitted,

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